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No. 02-1674 & Consolidated Cases

IN THE

Supreme Court of the United States

MITCH McCONNELL, SENATOR, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE COMMITTEE FOR ECONOMIC DEVELOPMENT, WARREN E. BUFFETT, EDWARD A. KANGAS, JEROME KOHLBERG, PAUL VOLCKER, AND SIXTEEN OTHER BUSINESS LEADERS IN SUPPORT OF APPELLEES

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INTRODUCTION AND INTEREST OF THE AMICI[1]

This brief *amici curiae* in support of the Appellees is submitted on behalf of the Committee for Economic Development (CED), a nonprofit, nonpartisan, and nonpolitical research and policy organization comprised of approximately 250 business leaders and educators, and a number of individual business leaders who support CED's position on campaign finance reform: Robert L. Bernstein, Warren E. Buffett, William K. Coblentz, Harry L. Freeman, Ronald Grzywinski, Edward A. Kangas, Thomas J. Klutznick, Jerome Kohlberg, Arjay Miller, Thomas S. Murphy, Steffen E. Palko, Raymond Plank, Sanford R. Robertson, Richard Rosenberg, George Rupp, Donald Stone, Robert D. Stuart, Jr., Dr. P. Roy Vagelos, A. C. Viebranz, and Paul Volcker.[2] CED's trustees set CED's research agenda, develop policy recommendations, and speak out for their adoption. CED has long been an outspoken voice in favor of campaign finance reform – particularly the need to prohibit unregulated soft money – and argued vigorously for passage of the reforms contained in the Bipartisan Campaign Reform Act of 2002 (BCRA).[3]

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1. Pursuant to Rule 37.6 of the rules of the Court, counsel for the *amici* discloses that counsel for the parties did not take part in authoring this brief in whole or in part, and no persons or entities other than the *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief. A copy of the letter of consent from the Solicitor General is being filed herewith.

2. The affiliations of the individual *amici* are listed in the Appendix to this brief.

3. As set forth more fully in a 1999 report developed by a group of business, academic, and political leaders, CED, after careful study,

(Cont'd)

Amici urge the Court to sustain BCRA's soft money restraints. By prohibiting national parties from raising, receiving, or spending funds that are not subject to the limitations imposed by the Federal Election Campaign Act (FECA), Pub. L. No. 93-443, 88 Stat. 1263 (1974), BCRA closes the soft money loophole through which corporations and other large contributors have been goaded into evading FECA's hard money limits, a phenomenon that has damaged both the democratic process and the business environment.

With this filing, the *amici* seek to highlight the extent to which prominent business leaders – those perceived to benefit the most from the access and influence purchased with soft money – do not wish to continue funding an unrestrained campaign finance "arms race." To the contrary, the *amici* are deeply troubled by the distortion of both the political process and of the free-market system that have resulted from the forced acquiescence of business in what effectively has become a corrupt soft money shakedown. There can be little doubt that the current soft money system promotes both the perception and reality of rampant influence peddling by both major parties and that it has given rise to the widespread belief that Congress routinely acts for the benefit of large corporate contributors, rather than on the merits of issues presented. At the same time, the taint engendered by the flood

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(Cont'd)

concluded that the soft money system had become dysfunctional and corrupt in a manner that tarnished solicitor and contributor alike and, more broadly, impaired the health of our democracy. *See* Committee for Economic Development, *Investing in the People's Business: A Business Proposal for Campaign Finance Reform* (1999) (the "CED Report") (Exh. 1 to the Declaration of Charles E. M. Kolb ("Kolb. Decl.")). By 2001, this report had been endorsed by over 300 executives.

of unregulated corporate soft money harms public confidence in business, as the public perceives large corporations to have secured unfair advantages and to have purchased disproportionate influence on the outcome of elections and on the operation of government. Businesses are also harmed directly to the extent that politically motivated policy decisions introduce an element of arbitrariness into the functioning of the market.

Corporate soft money contributions are a far cry from the issue-focused corporate speech that this Court held to be constitutionally protected in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Corporate soft money typically is neither acquired nor given for ideological reasons. As the *amici* are all too aware, and as the factual record in these cases convincingly documents, businesses typically make soft money contributions for one of two reasons: (i) to secure tangible benefits in the form of access to and influence over legislators; or (ii) to maintain access and avoid retribution in the form of adverse governmental action on issues that directly affect solicited businesses. Put differently, these contributions – often made in response to high-pressure solicitation by Members of Congress, party leaders, and others – are motivated by stark political pragmatism, not by ideological support for either party or their candidates. Because the stakes are potentially so high for solicited businesses, the reality is that soft money payments are "voluntary" only in the narrowest sense of that term. In truth, they are commonly made out of fear of the consequences of refusing to give – or refusing to give enough. That corporate soft money is calculated and functional, rather than expressive or ideological, in nature is exemplified by the propensity of companies to give to both parties in order to best protect their interests.

Amici fervently believe that BCRA's soft money ban sensibly advances the compelling government interest in protecting the political process against actual or perceived corruption without abridging expressive and associational rights protected by the First Amendment. Since its landmark ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court repeatedly has recognized the eradication of actual and apparent corruption in connection with campaign financing as a compelling government interest. BCRA's soft money ban is an urgently needed means of advancing this interest. Accordingly, the "deference to legislative choice" that this Court has consistently afforded Congress' efforts to restrict the influence of corporate money on federal elections is fully warranted here, as the soft money system is demonstrably "a plain threat to political integrity and a plain warrant to counter the appearance and reality of corruption and the misuse of corporate advantages." *Federal Election Comm'n v. Beaumont*, 123 S. Ct. 2200, 2207 (2003).

Section I explains the reasons businesses feel compelled to contribute soft money to the national parties and the detrimental impact of soft money on public perception of the role of business in the political process and on the integrity of the political process itself.

Section II demonstrates that restricting soft money contributions does not meaningfully impair political speech, as corporate soft money is not political expression, but an instrument with which to secure or maintain commercial advantage. As such, soft money has, at best, an attenuated relationship to the speech and associational rights protected by the First Amendment.

ARGUMENT

I. SOFT MONEY CONTRIBUTIONS ARE EXTRACTED FROM CORPORATIONS FEARFUL OF THE ADVERSE CONSEQUENCES OF NOT GIVING

CED's trustees and the individual *amici*, who are past and present chairmen, presidents, and senior executives of major American corporations and university presidents, have direct experience with being solicited by party leaders and elected officials for ever-increasing corporate soft money contributions. As such, they have "developed a particularized understanding of how the soft money fundraising system works and how it impacts the integrity of our elected officials, the integrity of American business, and more generally the health of our democracy." Declaration of Gerald Greenwald at ¶ 5 ("Greenwald Decl.").[4]

As set forth in the Greenwald Declaration, and as echoed by numerous other declarants, businesses generally make soft money contributions for one of two reasons: (i) to secure preferred access to and influence over legislators and other government officials and/or (ii) to maintain this relationship and avoid being disadvantaged as against competitors that contribute. *See* Greenwald Decl. at ¶¶ 9-10; *see also* Declaration of Alan G. Hassenfeld, Chairman and Chief Executive Officer of Hasbro, Inc. ("Hassenfeld Decl.") at ¶ 15; Declaration of Senator Warren Rudman, former

4. Gerald Greenwald, Chairman Emeritus of United Airlines, serves on the Board of Trustees of CED. *See* Greenwald Decl. at 1. From 1994 through his retirement in 2000, Mr. Greenwald served as Chairman and CEO of United Airlines. Prior to that, he was Vice-Chairman of the Chrysler Corporation and worked at the Ford Motor Company.

U.S. Senator (R-N.H.) ("Rudman Decl.") at ¶ 5. It is, in fact, precisely because large soft money contributors understand that such contributions secure or at least maintain preferred access that many companies give substantial contributions to both the Democratic and Republican parties – a telling fact that exposes the cynically pragmatic, rather than ideological, nature of soft money contributions.

A. Corporate Soft Money Contributions Are Made to Secure Preferred Access to and Influence over Government Officials

A full appreciation of the importance of removing soft money from the political process requires an understanding of the opportunistic nature of corporate soft money contributions. The massive evidentiary record in these cases amply supports the *amici*'s view of soft money solicitation and contribution as a fundamentally commercial process in which businesses feel compelled to participate.[5] *See* Declaration of Wright H. Andrews, attorney and lobbyist ("Andrews Decl.") at ¶ 8 ("Sophisticated political donors . . . are not in the business of dispensing their money purely on ideological or charitable grounds. Rather, these political donors typically are trying to wisely invest their resources to

5. Over the past several election cycles, as the range of activities funded with soft money has increased, party organizations have engaged in more aggressive efforts to raise soft money, seeking larger amounts from contributors and pursuing new contributors, especially among members of the business community. *See* CED Report at 27. The *per curiam* decision below notes that during the 1998 midterm elections, the national parties spent $221 million in soft money, or 34% of their total spending. During the 2000 elections, the corresponding figures were $498 million and 42%. *McConnell v. Federal Election Comm'n*, 251 F. Supp. 2d 176, 200-01 (D.D.C. 2003) (per curiam).

maximize political return."); Declaration of Wade Randlett, Chief Executive Officer of Dashboard Technology, an internet technology consulting firm ("Randlett Decl.") at ¶ 5 ("[M]any soft money donations are not given for personal or philosophical reasons. They are given by donors with a lot of money who believe they need to invest in federal office holders who can protect or advance specific interests through policy action or inaction."); Declaration of Robert W. Hickmott, former Democratic party official and fundraiser, at Exh. A ¶ 46 ("The majority of those who contribute to political parties do so for business reasons, to gain access to influential Members of Congress and to get to know new Members."); *McConnell*, 251 F. Supp. 2d at 481 (opinion of Kollar-Kotelly, J.) ("the evidence presented in this case convincingly demonstrates that large contributions, particularly [soft money contributions], provide donors access to federal lawmakers which is a critical ingredient for influencing legislation"); *id.* at 489-500, 511.

The success of the two major parties in soliciting soft money is directly attributable to the magnitude of the commercial interests corporations perceive to be advanced by contributing in response to such solicitations. The record leaves no doubt that although soft money checks are written to political parties, soft money contributors know that those checks "open the doors to the offices of individual and important Members of Congress and the Administration" and give contributors a chance to argue for their position and against alternative positions on a particular government policy. Greenwald Decl. at ¶ 12. As Mr. Greenwald explains:

> That access runs the gamut from attendance at events where [contributors] have opportunities to present points of view informally to lawmakers

> to direct, private meetings in an official's office to discuss pending legislation or a government regulation that affects the company or union.

Id. at ¶ 10. *See also* Declaration of Robert Rozen, a Washington lobbyist ("Rozen Decl.") at ¶ 12 ("That donation helps you get close to the person who is making decisions that affect your company or your industry. That is the reason most economic interests give soft money. . . .").

Members of Congress have acknowledged the crude "access for sale" character that the soft money system has acquired. For instance, Senator Carl Levin (D-Mich.) has stated:

> The parties advertise access. It's blatant. Both parties do it. Openly. Invitation after invitation sells access for large contributions. From 1996: For a $50,000 contribution or for raising $100,000 a contributors gets: Two events with the President. Two events with the Vice President . . . Monthly policy briefings with key administration officials and members of Congress. . . . One invitation in 1997 to a Senatorial Campaign Committee event promised that large contributors would be offered "plenty of opportunities to share [their] personal ideas and vision with" some of the top leaders and senators.

147 Cong. Rec. S3248 (Apr. 2, 2001). *See also* Declaration of Representative Christopher Shays (R-Conn.) ("Shays Decl.") at ¶ 9 ("Soft money donations, particularly corporate and union donations, buy access and thereby make it easier for large donors to get their points across to influential

Members of Congress."); Declaration of Senator Dale Bumpers, former U.S. Senator (D-Ark.) at ¶ 18 ("I doubt there is a politician on Capitol Hill who would deny that soft money donations get people access.").

The national parties exploit (i) the access they can provide to federal officeholders and (ii) the direct influence of federal officeholders and candidates on the interests of potential contributors to solicit large sums of soft money. National party leaders often ask executive branch officials and congressional leaders to appear at soft money fundraisers, attend weekend retreats with large soft money donors, participate in party-sponsored policy briefings, and play a role in other events. *See* CED Report at 27; Declaration of Peter L. Buttenwieser, a major Democratic donor, at ¶¶ 22, 25.

Solicitations from party officials are no different in kind or effect from those by elected officials. Companies know that party officials "inform elected officials about who has given significant amounts; and party officials often promise access to elected officials" to those who give large soft money contributions. Greenwald Decl. at ¶ 11. That access, in turn, permits donors to influence legislation that affects their businesses. As former United Airlines CEO and CED Trustee Greenwald bluntly states: "[B]usiness leaders believe – based on experience and with good reason – that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties." *Id.* at ¶ 12.[6]

6. In an op-ed in *The New York Times*, *amicus* Warren Buffett recounted a fund-raising Senator once jokingly telling him, "Warren, contribute $10 million and you can get the colors of the American flag changed." Warren E. Buffett, *The Billionaire's Buyout Plan*, N.Y. Times, Sept. 10, 2000, at A17.

It is no accident that the largest soft money contributors tend to be companies in industries that are heavily regulated by the federal government or those whose profits can be dramatically affected by government policy. These contributors are solicited by Members of Congress who sit on committees that consider matters directly affecting the financial health or operations of the companies being solicited. *See* Greenwald Decl. at ¶ 8; CED Report at 25. Representative Shays notes that "the large soft money contributions most [M]embers of Congress raise to meet their committee chairmanship or ranking member obligations come from the corporations and unions who are regulated by those very committees." Shays Decl. at ¶ 10.[7] This is a manifestly unhealthy state of affairs.

The blatantly opportunistic nature of the soft money system was documented in a poll conducted by the Tarrance Group for CED. The poll found that seventy-five percent of business leaders believe that political contributions give them an advantage in the shaping of legislation, while another twenty-three percent consider soft money a currency to be used "to buy access to influence the legislative process." Press Release, CED, Senior Business Executives Back Campaign Finance Reform (Oct. 18, 2000).

B. Soft Money Contributions Are Made to Avert Perceived Retribution

The malign and corrupting nature of the soft money system is demonstrated by the fact that corporate executives have felt coerced into giving ever-escalating soft money

7. *See also* Declaration of Senator John McCain (R-Ariz.) at ¶¶ 8-10 (giving examples of the influence of corporate soft money contributions on bills affecting the contributors' businesses).

contributions with ever-increasing frequency by subtle threats of retribution that accompany soft money solicitations. As Mr. Greenwald has noted, for many business executives "experience has taught that the consequences of failing to contribute (or failing to contribute enough) may be very negative." Greenwald Decl. at ¶ 9. *See also* Hassenfeld Decl. at ¶ 23 (noting perception by some companies that "because their activities are so closely linked with federal government actions, they must participate in the soft money system in order to succeed").

Corporations believe that elected officials and party leaders may shun or disfavor them if they do not "adequately" contribute and that "competing interests who do contribute generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company." Greenwald Decl. at ¶ 9. For example, the Tarrance Group poll of 300 senior executives of companies that had annual revenues of approximately $500 million or more, conducted for CED in the fall of 2000, found that half of business executives feared adverse legislative consequences to their companies or their industries if they turned down requests for campaign contributions from high-ranking political leaders and/or political operatives, and seventy-four percent of the executives polled felt that pressure is placed on business leaders to make large political contributions. *See* Press Release, CED, *supra*.

Members of Congress are well aware of the leverage they exert over solicited businesses. In this regard, Senator Rudman testified:

> By and large, the business world . . . gives money to political parties . . . [because] they believe that if they decline solicitations for such contributions, elected and appointed officials will ignore their

> views or, worse, that competing business interests who do make large contributions to the party in question will have an advantage in influencing legislation or other government decisions.

Rudman Decl. at ¶ 5.

This perceived threat of retribution underpinning the political parties' soft money solicitations was, ironically, underscored by the brazen reaction of the chairman of one of the political party committees to the issuance of the CED Report in 1999. When the CED Report was issued on March 18, 1999, Senator Mitch McConnell (R-Ky.), Chairman of the National Republican Senatorial Committee (NRSC) and a plaintiff in these actions, sent letters to various CED trustees declaring his "concern that a serious error [that CED prominently identifies you as a backer of its legislative plan] has occurred, which may cause some embarrassment to you if it is not immediately corrected." Kolb Decl. at ¶ 6 and Exh. 2 thereto. After CED replied to Senator McConnell, setting forth the basis for the report's conclusions, the NRSC chairman sent follow-up letters to various CED trustees expressing his astonishment and "great concern" that these well-known business leaders would concur with CED's position on campaign finance reform. *Id.* at ¶ 8. Senator McConnell added a personalized handwritten note urging the corporate executive CED trustees to withdraw publicly from CED. *Id.* and Exh. 4 thereto. As Mr. Kolb states in his declaration: "Several of these executives, who worked for companies that had significant issues pending before Congress at the time, considered the letters a thinly-veiled attempt to intimidate them with the implied message: Resign

and keep quiet, or don't count on doing business with Congress." *Id.*[8]

This type of threat is an integral aspect of soft money solicitation. A well-publicized article quotes a lobbyist for a Fortune 500 company as saying that the reason his company contributed soft money was "[b]asically, protection. . . . If you decline to give, you're taking a risk of legislative retribution. . . . Companies are scared that on some critical issue, they'll get hosed." Burt Solomon, *Forever Unclean*, The Nat'l J., Mar. 18, 2000, at 858.

The pervasive practice of giving soft money to both sides of the aisle exposes the fundamentally self-protective motives that drive corporate soft money contributions. According to data released by the FEC on June 9, 2003, 120 donors made soft money contributions totaling $500,000 or more in the 2001-2002 election cycle. More than sixty percent of those donors contributed to both Democratic and Republican national party committees. During that same period, a total of 185 donors gave soft money contributions of $50,000 or more to both Democrats and Republicans. *See* The Center for Responsive Politics, Soft Money to National Parties, *at* http://www.opensecrets.org/softmoney/softtop.asp (last visited July 21, 2003). In 1996, forty of the top fifty soft money contributors gave to both major parties, while in 2000 thirty-five did. *McConnell*, 251 F. Supp. 2d at 509 (opinion of Kollar-Kotelly, J.).

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8. *Amicus* Edward A. Kangas, former chairman of the global board of directors of Deloitte Touche Tohmatsu and the campaign finance reform co-chairman of CED, noted in a newspaper editorial: "The threat may be veiled, but the message is clear: failing to donate could hurt your company." Edward A. Kangas, *Soft Money and Hard Bargains*, N.Y. Times, Oct. 22, 1999, at A27.

Judge Kollar-Kotelly, in her opinion below, noted the evidence that this practice "is a result of donors' desire to have special access to lawmakers from both parties, and also out of concern that if the contributor gives to only one political party, the other will perceive an imbalance and punish the donor." *McConnell*, 251 F. Supp. 2d at 509 (opinion of Kollar-Kotelly, J.). *See also*, *e.g.*, *id.* at 678-80 (noting that giving to both parties is motivated by fear of giving to a party that subsequently loses control of Congress); Randlett Decl. at ¶¶ 11, 12 ("Giving lots of soft money to both sides is the right way to go from the most pragmatic perspective. . . . If your interests are subject to anger from the other side of the aisle, you need to fear that you may suffer a penalty if you don't give."); Declaration of Charles M. Geschke, co-founder and Chairman of the Board of Adobe Systems, Inc., at ¶ 10 (donors who give large amounts of soft money to both parties "may feel that influence with one party is not sufficient to achieve their financial or policy goals, especially now that power in Congress is pretty evenly balanced"). This practice of contributing simultaneously to both parties belies any claim that contributions are ideologically, as opposed to pragmatically, driven.

The fundamentally corrupt nature of this system led industry leaders like General Motors and AlliedSignal publicly to declare that they would no longer make soft money contributions to the political parties, and dozens of corporate executives similarly recognized the dangers to our system of government created by soft money solicitation. *See* CED Report at 33-34. But these voluntary efforts, however laudable and courageous, cannot solve the problem of soft money. For every large corporation that may be willing to draw the line, there exist dozens of others, perhaps more vulnerable, that will continue to "give large soft money

contributions to political parties – sometimes to both political parties – because they are afraid to unilaterally disarm." Greenwald Decl. at ¶ 12.

The access afforded by soft money contributions is a competitive, as well as a political, reality. How many corporations will have the fortitude not to ante up at the soft money table knowing that their competitors are still in the game? The solution, Congress reasonably determined, is to end the game.

C. Actual and Perceived Corruption Engendered by Soft Money Contributions Has Eroded Confidence in Business and Government

The perversion of the soft money system into a widely acknowledged "pay to play" shakedown scheme by both major parties understandably has eroded public confidence in the integrity of business, and it has greatly contributed to the cynicism and skepticism with which the public views the involvement of business in the political process. As CED stated in its 1999 Report: "Given the size and source of most soft money contributions, the public cannot help but believe that these donors enjoy special influence and receive special favors." CED Report at 27. *See also* Andrews Decl. at ¶ 20 ("[M]illions of Americans are convinced that lobbyists and the interests we represent are unprincipled 'sleaze balls' who, in effect, use great sums of money to bribe a corrupt Congress.").

It is clear that the public perception that policy decisions are warped by a sense of obligation to the donors of large unregulated contributions has harmed the public trust in the integrity of its government. As Senator McCain has observed:

> In 1961, 76% of Americans said yes to the question, "Do you trust your government to do the right

> thing?" This year, only 19% of Americans still believed that. Many events have occurred in the last 30 years to fuel their distrust. Assassinations, Vietnam, Watergate, and many subsequent public scandals have squandered the public's faith in us, and have led more and more Americans from even taking responsibility for our election. But surely frequent campaign finance scandals and their real or assumed connection to misfeasance by public officials are a major part of the problem.

147 Cong. Rec. S2434 (Mar. 19, 2001). *See also* Declaration of Alan K. Simpson, former U.S. Senator (R-Wyo.), at ¶ 14 ("Both during and after my service in the Senate, I have seen that citizens of both parties are as cynical about government as they have ever been because of the corrupting effects of unlimited soft money donations."); Declaration of Senator David Boren, former U.S. Senator (D-Okla.) and President of the University of Oklahoma, at ¶ 11 ("American's (sic) trust of government and political parties has fallen precipitously over the years. I . . . ask [my] students why they think this is the case. Almost unanimously, they respond that our government has been 'purchased' by special interests.").

A plethora of polls and studies demonstrates the extent of the damage wrought by the incessant solicitation and contribution of soft money to the public's perception of the integrity of the political process. As the CED Report stated in 1999 – before the business scandals of the last two years: "The vast majority of citizens feel that money threatens the basic fairness and integrity of our political system. . . . Fully two-thirds of the public think that their own representative

in Congress would listen to the views of outsiders who made large political contributions before a constituent's views." *Id.* at 1 (internal quotations omitted).

The CED Report's summary of the dismaying downward spiral of public perception of the political process is consistent with a recent non-partisan poll conducted by Democratic pollster Mark Mellman and Republican pollster Richard Wirthin. The principal finding of their study was that the American public believes that the views of large contributors to parties "improperly influence policy and are given undue weight in determining policy outcomes." *See* Mark Mellman and Richard Wirthin, Research of Findings of a Telephone Study Among 1300 Adult Americans (Sept. 23, 2002). The poll found that eight in ten Americans believe that, at least sometimes, members of Congress vote based on the wishes of big contributors to their political parties. Nearly half of those polled said this happens often. In addition, the poll found that more than three in four Americans believe that big contributors to political parties have at least some impact on decisions made by the federal government, and more than half of those polled think that big contributors have a great deal of impact. *See id.*[9]

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9. Similar results were found in a poll conducted by *The New York Times* and CBS News in April 1997. Seventy-five percent of Americans said "yes" to the question "In general, do many public officials make or change policy decisions as a result of money they receive from major contributors." Only 14 percent answered "no." *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Financing, Poll Finds*, N.Y. Times, Apr. 8, 1997, at A1; *see also* Press Release, Public Campaign, New National Survey Shows Robust Support for "Clean Money" (Apr. 3, 2000).

Members of Congress have voiced the concerns of the American public about the corrupting influence of large contributions on the political system. In 1999, for example, Senator Russ Feingold (D-Wisc.) highlighted the extent to which soft money has perverted the legislative process:

> The appearance of corruption is rampant in our system, and it touches virtually every issue that comes before us. . . . [T]oday, when we weigh the pros and cons of legislation, many people think we also weigh the size of the contributions we got from interests on both sides of the issues. And when those contributions can be a million dollars, or even more, it seems obvious to most people that we would reward our biggest donors.

147 Cong. Rec. S2446 (Mar. 19, 2001).[10]

This distrust and cynicism also threatens to have a deep and longstanding impact on the public's trust in the integrity of corporate management and on the economy. As the authors of the CED Report state:

> As business leaders, we are also concerned about the effects of the campaign finance system on the

10. Similarly, Representative Lloyd Doggett (D-Tex.) observed:

> [T]he corrupting influence of money on public policy is evident in [the] House every day. It is evident not only as a principal concern that arises here on vote after vote, significantly influenced by who gave how much, to whom, when, but it is also particularly evident in the silence on critical issues of public policy, on what is never discussed.

147 Cong. Rec. H3966 (Jul. 12, 2001).

> economy and business. Americans identify "special interest" principally with corporations. A vibrant economy and well functioning business system will not remain viable in an environment of real or perceived corruption, which will corrode confidence in government and business. If public policy decisions are made – or appear to be made – on the basis of political contributions, not only will policy be suspect, but its uncertain and arbitrary character will make business planning less effective and the economy less productive. In addition, the pressures on business to contribute to campaigns because their competitors do so will increase. We wish to compete in the marketplace, not in the political arena.[11]

CED Report at 1. CED Trustee Greenwald amplified these concerns:

> It goes without saying that maintaining governmental integrity is critically important to our democracy and our citizens' faith in their government. It is also important for American[s] to have faith in the integrity of their business institutions and labor unions as well. The recent spate of deplorable corporate scandals has broadly demoralized America and this is having widespread and adverse political and economic

11. *See also* Press Release, Campaign for America, Testimony of Cheryl Perrin, Executive Director, Campaign for America, House Administration Committee (Jul. 22, 1999) ("[W]hile it is naïve to think that the government won't play a role in shaping the market, the soft money system encourages companies to allow the government to intervene in the market in an arbitrary and unfair way.").

> consequences. It is not good for America when American citizens believe their business leaders are corrupt, and one element of that regrettably widespread perception is the appearance that business buys government decisions by making large political contributions.

Greenwald Decl. at ¶ 14.

At this time of widespread shaken confidence in American corporations, restricting soft money is necessary to help restore public confidence in the integrity of business and government. It is also necessary to restore the fairness of the marketplace. As Wade Randlett, CEO of Dashboard Technology, testified:

> The raising and spending of soft money in recent election cycles has distorted the federal political system and the commercial marketplace. . . . [M]uch of the business community believes that the federal campaign financing system is broken and needs to be fixed. People in business look for a reasonable, rational system and a level playing field. The current soft money-oriented system does not meet that standard.

Randlett Decl. ¶ 14.

II. BCRA'S PROHIBITION ON SOFT MONEY SOLICITATION AND CONTRIBUTION DOES NOT SIGNIFICANTLY ABRIDGE FIRST AMENDMENT RIGHTS

A. Corporate Soft Money Does Not Reflect the Ideas of Its Contributors

This Court has held that limitations on political contributions by individuals entail "only a marginal restriction upon the contributor's ability to engage in free communication" because "a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976). Corporate soft money has even less communicative value and, hence, less of a claim to constitutional protection because, unlike political contributions by individuals, it is motivated principally by pragmatic commercial concerns.

As demonstrated in Section I, corporate soft money contributions typically do not represent an expression of the contributor's identification with a political party or its platform but are nothing more than an attempt to advance or protect commercial interests. They are investments, not expressions of ideological support. *See*, *e.g.*, Declaration of Steven T. Kirsch, founder and Chief Executive Officer of Propel Software Corporation, at ¶ 14 ("Major donors perceive that they are getting a business benefit through their special access, and that it is a good investment for them.").

The fact that corporate soft money contributions are made for commercial purposes – by entities that do not, after all, vote – weakens any argument that such contributions

implicate core First Amendment values. Moreover, to the extent that corporate soft money is given to protect against unfavorable treatment, it does not even constitute a voluntary expression of support; rather, it is merely, in essence, a coerced pay-off to avoid retribution. As Representative Christopher Shays explained, a soft money contribution is "really like protection money. . . . It guarantees you a place at the table. They know you are a friend and you don't hurt friends, but in order to be a friend, you've had to buy that protection."[12] *See also* Randlett Decl. at ¶ 14 ("[M]any members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game. They are caught in an arms race that is accelerating, but that many feel they cannot afford to leave or speak out against.").

Although soft money contributions are not compelled by law in a manner that would warrant literal application of the compelled speech doctrine, to the extent that soft money does have communicative value or subsidizes political speech, the coercive nature of the soft money system warrants analogizing soft money to constitutionally disfavored forms of coerced expression, such as compelled dues payments. *See, e.g., Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 235-36 (1977) (First Amendment requires that labor union expenditures to express political views not germane to its duties as collective-bargaining representative not be financed by employees "coerced into doing so against their will"); *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 522 (1991) ("[T]he State constitutionally may not compel its employees to subsidize legislative lobbying or other political union

12. Jonathan D. Salant, *Businesses Tire of Soft Money Contributions*, Associated Press, Nov. 23, 1999.

activities outside the limited context of contract ratifications or implementation."). *See also United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (mandated support for speech "is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity"). The compelled-speech doctrine offers a useful analogy that underscores the low level of constitutional protection to be accorded to soft money contributions made in response to coercive solicitation.

The disassociation of soft money from political expression is starkly illustrated by the fact, noted above, that many soft money contributors "express their narrow interests by contributing to both parties during the same electoral cycle, *and sometimes even directly to two competing candidates in the same election*." *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 451-52 (2001) (emphasis added) (citing FEC disclosure reports documenting that many large corporations give to both parties). Those who give soft money to both parties do so not to express support for political ideas but "because they want to make sure they have access regardless of who's in the White House, filling the Senate seat, or representing the Congressional District." Declaration of Arnold Hiatt, former President and Chief Executive Officer of the Stride Rite Corporation, at ¶ 12.

Finally, the nexus to political expression is weakened further still in those instances where soft money contributors give to the political party committees without knowledge of how the contribution will be used, for whom it will be used, or what message it will be used to promote. *See* Rozen Decl.

at ¶ 12 ("From [the contributor's] perspective, what account the money goes into or how it's used is not important."); *see also* Hassenfeld Decl. at ¶ 15 ("Donors know that if they give $100,000 in soft money to the Republicans or $100,000 to the Democrats, that will entitle them to some type of access. They are not concerned with how that money is used.").

B. Corporate Soft Money Contributions Distort the Marketplace of Ideas

Corporate soft money contributions do not contribute to the "marketplace of ideas" protected by the First Amendment. Instead, they reflect wealth amassed in the marketplace, not the ideas of investors and employees, who have no control over contributions made to political parties from the corporation's general treasury funds. More troubling, as Senator Rudman testified, is that "large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done." Rudman Decl. at ¶ 9.

This Court has held that the "unique legal and economic characteristics of corporations" and "special advantages" granted by state law "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658-59 (1990) (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986)). "This concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas." *Massachusetts Citizens for Life*, 479 U.S. at 257.

The size of the treasury amassed by a corporation does not reflect popular support for the corporation's political ideas. Rather, it reflects "the economically motivated decisions of investors and customers." *Massachusetts Citizens for Life*, 479 U.S. at 258. These resources may be used to make a corporation a formidable political presence "even though the power of the corporation may be no reflection of the power of its ideas." *Id.*

Indeed, these resources may make the corporation a political presence that runs counter to the ideas of its investors and employees, just as a union may engage in political activity that some members may not support. Courts have voiced concern for individuals who have paid money into a corporation for purposes other than the support of candidates from having that money "used to support political candidates to whom they may be opposed." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982).

> [Stockholders and union members] contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends. Furthermore, because such individuals depend on the organization for income or for a job, it is not enough to tell them that any unhappiness with the use of their money can be redressed simply by leaving the corporation or the union.

Massachusetts Citizens for Life, 479 U.S. at 260; *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 416 (1972) (citing concerns about the voluntariness of contributions and protecting the minority stockholder or

union Member as reasons underlying congressional regulation of contributions made in connection with federal elections).

As far back as 1907, Congress, in regulating political contributions by corporations, was motivated by "the feeling that corporate officials had no moral right to use corporate funds for contribution to political parties without the consent of the stockholders." *United States v. Congress of Indus. Orgs.*, 335 U.S. 106, 113 (1948). Accordingly, restricting the use of corporate funds in elections prevents corporations from, in effect, being pressured into allocating for purposes for which they were not intended general treasury funds which may not have been given by investors in the first place had they known how they would be used.

C. A Ban on Soft Money Does Not Offend the First Amendment Right of Association

The First Amendment protects political association as well as political speech. *Buckley*, 424 U.S. at 15; *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958). "[F]reedom to associate with others for the common advancement of political beliefs and ideas" is protected by the First Amendment. *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973). The right to associate with the political party of one's choice "is an integral part of this basic constitutional freedom." *Id.* at 57.

In *Buckley*, however, the Court held that even a significant interference with associational rights could be outweighed by a campaign finance restriction closely drawn to advance a sufficiently important government interest. 424 U.S. at 25. Because the associational rights implicated

by BCRA's soft money ban are (like the free speech rights implicated) weak at best, they are easily outweighed by the important public interests advanced by BCRA's soft money restraints.

First, as discussed above, corporate soft money contributions typically are not expressions of support for the ideological platform of a political party. Second, even where that is not the case, because contributors have no way of knowing where and for what their soft money is being used – and often do not care – the contributions are not linked in any meaningful way to any specific political ideas. Accordingly, even to the extent such contributions may express support for the platform (or elements of the platform) of the party to which they are given, they do not further the values secured by the right of association, namely the "pool[ing] of resources in furtherance of common political goals." *Buckley*, 424 U.S. at 22. Rather, they represent, at bottom, commercially motivated payments.

Third, despite no longer being able to contribute soft money, donors still will be able to associate with and demonstrate public support for a political party and a political party's ideological platform in traditional and far more meaningful ways. *See, e.g., Buckley*, 424 U.S. at 22 ("[FECA's] contribution ceilings thus limit one important means of associating with a candidate or committee, but leave the contributor free to become a member of any political association and to assist personally in the association's efforts on behalf of candidates"). Corporate executives still can – and certainly will – continue to contribute to political parties as individuals.

Given the limited degree, if any, to which soft money evinces a contributor's genuine interest in associating with a political party for ideological reasons and the multitude of other avenues of more meaningful association with a political party and its platform, a restraint on soft money will have only minimal, if any, impact upon the associational rights protected by the First Amendment.

CONCLUSION

The coercive soft money system that BCRA eliminates has corrupted solicitor and contributor alike. It has engendered understandable public cynicism regarding both business and government. It has interfered arbitrarily in the functioning of the economy. Business leaders increasingly wish to be freed from the grip of a system in which they fear the adverse consequences of refusing to fill the coffers of the major parties. The coerced and, at bottom, wholly commercial nature of corporate soft money contributions distinguishes them from political speech, as well as from the type of ideological association protected by the First Amendment. Given the compelling government interest in eliminating both actual and perceived corruption from the political process, BCRA's ban on soft money in federal elections should be sustained.

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Apache Corporation

Sanford R. Robertson
President
S.R. Robertson & Company, LLC

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